I therefore grant the relief prayed for under items (1), (2) and (5) of the statement of claim to the plaintiff. As no evidence was adduced on damages suffered I refuse to grant the order on this item.

**ONG BENG CHENG**

**v.**

**CHIU WING WA @ CHEW WENG WAH & 3 ORS.**

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[ORIGINATING SUMMONS NO. 24-832-92]
28 SEPTEMBER 1993

***PRACTICE AND PROCEDURE: Irregularity in initiating proceedings - Whether nullifies proceedings - Originating summons - Whether pleading.***

***LAND LAW: Charged land - Auction sale - Monthly tenants on land - Whether tenants protected - Whether there was endorsement on register document of title - Rent controlled premises - Whether provisions of Control of Rent Act 1966 prevails over provisions of National Land Code 1965.***

The plaintiff purchased double-storey terrace houses by way of a Court ordered public auction and subsequently claimed vacant possession from the defendants who claimed to be the monthly tenants of the previous landowner.

The plaintiff has issued notices to quit to the defendants. The defendants failed to vacate the property.

The various issues for the Court were:

(a) whether irregularity in initiating proceedings nullifies the proceedings.
(b) whether the houses on the property were rent controlled premises or governed by the National Land Code.

**Held:**

**[1]** Irregularity in initiating proceedings does not nullify proceedings. An originating summons is not a pleading as it is not a summons in a pending cause or matter.

**[2]** The provisions of the Control of Rent Act 1966 does not prevail over the provisions of the National Land Code 1965.

**[3]** From the provisions of the National Land Code, persons claiming benefit of a monthly tenancy in respect of charged land which is subsequently sold by a Court-ordered public auction must prior to the date of registration of the certificate of sale apply to protect the

tenancy by an endorsement on the register document of title. Otherwise, the purchaser will not be bound by any tenancy granted by the chargor.

**[4]** As the defendants had failed to so endorse the tenancy on the register document of title, no relationship of landlord and tenant had been created between the plaintiff and the defendants. The defendants were therefore trespassers.

*[Plaintiff's application allowed with costs. Defendants ordered to deliver vanant possession. Damages ordered to be assessed].*

**Cases referred to:**

*Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1990] 2 CLJ 1044 / [1991] 1 MLJ 221 (High Court); [1991] 1 CLJ 656 / [1991] 1 MLJ 404 (Supreme Court)* ***(foll)***

*Public Bank Bhd. v. Wan Leong Hup Kee Co. [1992] 2 CLJ 1070* ***(cit)***

*Rosita binti Baharom [Budak] v. Sahedin bin Salleh [1993] 2 CLJ 300 / [1993] 1 AMR 20: 799 @ 805* ***(refd)***

*Leong Yoong v. Lee Sem Yoong [1968] 2 MLJ 72* ***(refd)***

**Legislation referred to:**

Civil Law Ordinance 1956, s. 6
Control of Rent Act 1966, ss. 4(2)(a), 16, 18
Control of Rent Ordinance 1956
Interpretation Acts 1948 and 1967, s. 62
Kelantan Land Settlement Ordinance 1955
Land Code, s. 42(v)
Land (Group Settlement Areas) Act 1960
National Land Code 1965, ss. 4(2), 213(1)(a), (2), (3), (4), 221(4), 222(4), 223(3), 225(1)(a), 226(1), 227(1), 234, 256, 259(3), 265(4), 267(1), (2), (3), 281(3), 316(1), 317(5), Forms 15A, 15B
Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955
Rules of the High Court 1980, O. 1 r. 4(1), O. 2, rr. 1(3), 2(1), 3, O. 33, O. 56 r. 2(2) (repealed), O. 89, Forms 7, 8A
Specific Relief Act 1950, s. 41
Trengganu Settlement Enactment 1356

**Other sources referred to:**

**Tenure and Land Dealings in the Malay States**, Dr. David Wong, pp. 415, 454
**The Supreme Court Practice 1985**, Vol. 1, paragraph 18/A

*For the plaintiff - Thangaraj Balasundram; M/s. Zainuriah & Thangaraj*
*For the first and second defendants - Chong Woon Khoon; M/s. Chong Woon Khoon*
*For the third and fourth defendants - See Ewe Lin; M/s. Ooi Lee & Co.*

**JUDGMENT**

**T. Selventhiranathan JC:**

The plaintiff filed this originating summons against the four defendants claiming vacant possession forthwith of two specific lots of land on which are erected four units of pre-war double-storey terrace houses ("the property in question" or "the property" collectively, or "the land" or "the premises", as the context may require), bearing addresses 1, 3, 5 and 7 Carnarvon Lane, Penang, as well as damages and costs.

The facts are largely not in dispute. The plaintiff purchased the property in question by way of a court-ordered public auction on 6 January 1992 for RM141,000. Upon payment of the balance of the purchase price, he became the registered proprietor thereof on 25 May 1992. Among the conditions of sale was a stipulation that the property was "... sold subject to all assets, liabilities and rights (if any) .subsisting thereon ...".

On 28 July 1992 the plaintiff, through his solicitors, issued separate notices to quit to all four defendants as occupiers of the property and demanded that they deliver up vacant possession by 31 August 1992. Failure to do so would be visited by the taking of "the necessary action to evict you and claim for damages". The defendants failed to vacate the property and the plaintiff filed this application by way of originating summons on 28 September 1992.

The defendants in their various affidavits deny the plaintiff's right to evict them and contend that they had all been monthly tenants of the previous owner for lengthy periods of time, that the houses on the property are controlled premises and they are therefore entitled to the protection of the Control of Rent Act 1966 ("the Act"). The first defendant contends in addition that by an agreement entered into on 26 June 1989 with the previous tenant, the latter lawfully assigned all her right, title and interest in 1 Carnarvon Lane to him for a consideration of RM20,000. The assignment was purportedly done with the consent of the then landlord, one Ng Kee Seow. (However, nothing turns on this as Mr. Chong Woon Khoon for the first defendant did not advance any argument in respect of the purported assignment). All four defendants exhibit receipts of rents paid to the previous owner of the property over varying periods of

time. The receipts acknowledge monthly payments of rents.

The plaintiff's application was heard on 14 June 1993 after three adjournments at the behest of the parties to file affidavits in reply, the main reason therefor being late service of affidavits necessitating in turn adjournments to file the affidavits in reply.

At the hearing, Mr. Thangaraj for the plaintiff contended that the defendants' occupation of the premises had been lawfully terminated by the notices to quit as well as by the service on the defendants of the summons herein. This sufficed under the law for the plaintiff to be given vacant possession as claimed. The two register documents of title to the property did not reveal any endorsement of claim pertaining to the alleged tenancies under s. 316 (1) of the National Land Code 1965 ("the Code") and therefore the plaintiff at the time of purchasing the property had had no notice of any subsisting rights in respect of the property. He cited in support of his contention the cases of *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221 (High Court); [1991] 1 MLJ 404 (Supreme Court), and *Public Bank Bhd. v. Wan Leong Hup Kee Co.* [1992] 2 CLJ 1070.

Mr. Chong Woon Khoon, for the first and second defendants, submitted that although the facts were not in dispute, there were two important factors, however, for consideration, namely, that the houses erected on the two lots of land were of pre-war vintage, and that the plaintiff had purchased the property in question "... subject to all easements, liabilities and rights (if any) subsisting thereon ...".

But before proceeding to the merits of the case, Mr. Chong raised a preliminary objection that the pleadings of the plaintiff were defective in that the plaintiff had failed to identify his cause of action in the "intitule" (*sic*) (by which he meant the title or heading) of the summons resulting in embarrassment to the defendants. He said that the title was completely silent as to the exact provision of the law that the plaintiff was relying on. In his view, this was a defect that totally took away the jurisdiction of the Court to proceed any further. He submitted that in any originating application, the Court must be fully apprised of the relevant or applicable law by the applicant and that it was not the duty of the other party to do so. The defect in the title in the present case had created difficulties for the first and second defendants in preparing their defence. He referred to the decision of the Supreme Court in *Rosita binti Baharom [Budak] v. Sahedin bin Salleh* [1993] 1 AMR 20: 799 @ 805 to support his contention:

> The system of pleadings has not been designed to be weighted in favour of the plaintiff but to ensure ... that there is fair play between the parties and that each party knows what issues he has to meet on the pleadings in advance ...

He submitted that the reference by the plaintiff only in his affidavit, but not in the title of the summons, to ss. 221(4), 222(4) and 227(1) of the Code "would tend to give the impression that the plaintiff is seeking a declaration that he is the owner of the land in question and for the consequential relief that the defendants be ordered to vacate the premises erected on the said land." In his view, this would then call for a consideration of s. 41 of the Specific Relief Act 1950. That being so, the plaintiff ought to have proceeded by way of writ action and not by originating summons. He submitted that even if the correct mode of initiating these proceedings was by way of originating summons, the title thereof should have included the words:

> And in the matter of s. 41 of the Specific Relief Act 1950.

According to him, the importance of the insertion of this phrase *vis-a-vis* the function of pleadings was that totally different considerations would apply if there, was a definite reference to the Specific Relief Act 1950. He submitted that in the circumstances the first and second defendants would have to guess as to the issues they had to face, and that they and their Counsel must not be left to grope in the dark.

Mr. Chong submitted further that as the plaintiff had alleged that the first and second defendants were trespassers, the proceedings should have been brought by way of an application under O. 89 of the Rules of the High Court 1980, which should have been clearly set out in the title as different considerations would apply then. In his view, the defect in the pleadings of the plaintiff was confusing as to the basis of the plaintiff's claim and in the circumstances the Court had no jurisdiction to make any order

except to dismiss the claim with costs. (Any reference hereinafter to "the Rules" means the Rules of the High Court 1980, "Form" and "Order" mean that Form in the Appendix to the Rules and that Order of the Rules respectively, and "rule" means a rule of that Order).

Mr. Chong then went on to submit on what he termed the substantial ground of objection. He stated that if the Court ruled it had the jurisdiction to hear the plaintiff's claim and/or that the first and second defendants were not prejudiced or embarrassed by the plaintiff's pleadings, the first and second defendants would seek the protection of the Act. In his view, it is settled law that in any case where reliance is placed in the provisions of the Act to avoid eviction by a landlord, all that the tenant has to do is to show that he is a tenant. Once that is done the onus shifts to the landlord to prove that the premises were completed after 31 January 1948 and therefore free from the operation of any of the provisions of the Act pursuant to s. 4(2)(a) thereof. He referred to the decision of the Federal Court in *Leong Yoong v. Lee Sem Yoong* [1968] 2 MLJ 72 to support this contention. He submitted that it was never in dispute in the present case that the premises were pre-war houses and that the defendants were the tenants of the previous owner.

He contended that the provisions of the Act run parallel to Part Fifteen, Chapter 1 of the Code. In his view s. 225(1)(a) of the Code expressly provides for the exclusion of the Code and makes provision for the operation of the Act. There was no need for the first and second defendants to register their interest which arose by way of operation of law as it would be "ridiculous to give a right on the one hand under the Control of Rent Act 1966 and take that away under the National Land Code 1965". Sections 16 and 18 of the Act protected the tenant and the landlord could only recover vacant possession if he complied with s. 18. Section 18 did not penalise the tenant for failure to register his interest. Where there was a conflict between a general law and a specific law, the specific law should prevail. In the present case the general law was the Code, and the specific law was the Act which related specifically to controlled premises under the Act. The latter law should therefore prevail.

Mr. See Ewe Lin, for the third and fourth defendants, adopted Mr. Chong's arguments in submission. His supplemental argument was that as the defendants were monthly tenants who were protected under the Act, and as their interests in their respective tenancies were less than for a duration of three years, there was no need to have their interests endorsed on the register documents of title to the land in order to be protected under the Act. He sought to distinguish *Hotel Ambassador* from the present case on the ground that the lease which had been granted by the previous owner in that case had been registered under the Code. Upon expiry of the lease, no interest was vested in the property. On that ground that case was distinguishable from the present case.

On the question of what he saw as a conflict between the Code and the Act, he submitted that for rights to arise under the Code, all leases had to be registered. However, the Act protected all lawful tenants. By virtue of being a later law as compared with the Code, the Act should prevail. He submitted that the plaintiff in *Hotel Ambassador* had to renew the lease and register it under the Code to enjoy its protection but there was no need to do so here where the defendants were monthly tenants who were protected by the Act. If the submission of the plaintiff in the present case was accepted, it would give rise to a situation which would allow landlords to circumvent the Act.

Mr. Thangaraj submitted in reply that there was no conflict between the two laws. The issue here was as to who had the prior right: a purchaser of the property at a public auction or a tenant of the previous owner. In the present case there was no registration of any interest of the defendants on the register documents of title to the land in question by way of endorsement, and there was therefore no notice to any intending purchaser thereof of any such interest. There was no provision under the Act for a situation thereunder to be exempted from the provisions of the Code. The facts in the present case were similar to those in *Hotel Ambassador* where a monthly tenancy was also involved.

In his view it was not necessary to refer to O. 89 in the title of the summons in commencing the proceedings herein. He contended that the application here was not under O. 89 but under s. 234 of the Code and he referred to the decision of the Supreme Court in *Hotel Ambassador* in support of his contention.

On the preliminary objection raised by the defendants, I found that the failure by the

plaintiff to specify in the title of the summons under what provision of law the application was being made was not fatal as contended. The summons was sufficiently clear to show that vacant possession of the property was being sought. The question of any declaration under the Specific Relief Act 1950 being sought could not in any way be inferred. The affidavits of the plaintiff in support of the application gave notice to the defendants that the action was initiated on the basis that the defendants' occupation of the premises had been properly terminated as the tenancies had not been endorsed under s. 316 of the Code on the register documents of title to enjoy the protection of that section. In fact, the plaintiff contended that he was not aware of any tenancy, lease or sublease in respect of the property as the register documents of title did not show this when he purchased the property.

It would appear from Mr. Thangaraj's contention that the form he employed in initiating the proceedings was Form 7. He relied heavily on the fact that the application by the defendants in *Hotel Ambassador* was made by way of a summons in chambers. But, with respect, he failed to appreciate that there it was an application under O. 33 (for the decision of a preliminary issue which would render the trial of the matter unnecessary) arising in proceedings which had already been commenced by a writ action. It was the proper mode of application at that stage of the proceedings in that case. However, in the present case, the originating summons itself initiated the proceedings and therefore the proper form to have been utilised should have been Form 8A, pursuant to O. 89. This is because the plaintiff commenced the summary proceedings herein for possession of land (which perforce had to be under O. 89) where the basis of his contention was that the defendants had remained in occupation without his licence or consent which resulted in their being trespassers. But, in my view, the failure to comply strictly with Form 8A in initiating the proceedings was an irregularity which did not nullify the proceedings and which irregularity was curable under O. 2, r. 1 and I so hold. In this context, s. 62 of the Interpretation Acts 1948 and 1967 is also applicable:

> Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

I am further fortified in so holding by O. 2, r. 2(1) as the defendants only raised the objection late in the proceedings and after having taken fresh steps therein by filing their affidavits in reply despite being aware of the irregularity. This amounted to their waiving their right to object to the irregularity. Furthermore, O. 2, r. 1(3) provides that "the Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed". The contention of the defendants that the Court lacked jurisdiction to proceed to hear this application and make any order thereon also fails for this reason.

The further contention of the defendants that the originating summons herein was a pleading by which the plaintiff was strictly bound and that the summons could not be elaborated upon by affidavit is also without merit. Order 1, r. 4(1) defines "originating summons" and "pleading" as follows:

> 'originating summons' **means every summons other than** a summons **in a pending cause or matter;**
> (emphasis added)
>
> 'pleading' **does not include a** petition, **summons** or preliminary act;"
> (emphasis added).

An originating summons is therefore not a pleading as it is not a summons in a pending cause or matter. If it were to be considered a pleading, especially in the context of O. 89, it would defeat the purpose of providing for recourse to summary proceedings to determine questions which are straightforward and which obviate the need for such determination through a witness action. Order 89, r. 1 stipulates:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

Rule 2 of that Order requires the originating summons to be in Form 8A. Rule 3 of the same

Order specifies that the plaintiff shall file in support of the originating summons an affidavit stating -

(a) his interest in the land;
(b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
(c) that he does not know the name of any person occupying the land who is not named in the summons.

The form employed for the originating summons in the present case was a combination of Forms 7 and 8A. The summons after specifying the reliefs sought bears indorsements to the effect that the grounds of the application are as contained in the affidavit of the plaintiff, and that (as in Form 8A) any person in occupation of the premises not named as a defendant may apply to be joined as a defendant and that if such person does not attend personally or by Counsel at the hearing of the application, such order will be made as the Court may think just and expedient.

These provisions of O. 89 categorically do not envisage a witness action which would involve pleadings. The issues are intended to be determined on a consideration of the originating summons and affidavits, both of which are not pleadings. As stated by the authors of "**The Supreme Court Practice 1985**" at paragraph 18/A of Vol. 1 thereof:

> The term 'pleading' is defined negatively in O. 1, r. 4(1) as not including a petition, summons or preliminary act. Pleadings are the written statements of the parties of all the material facts on which each party relies for his claim or defence, as the case may be. **They apply only in actions begun by writ and not by any other mode.** A generally indorsed writ of summons is not a pleading [*Murray v. Stephenson* [1887] 19 QBD 60; *Wallis v. Jackson* [1883] 23 Ch D 204]; but a statement of claim indorsed on the writ is [*Anlaby v. Praetorius* [1888] 20 QBD 764; *Robertson v. Howard* [1878] 3 CPD 280] and so are particulars for some purposes. **But an originating summons is not a pleading, nor is the affidavit in support thereof** [*Lewis v. Packer* [1960] 1 WLR 452; [1960] 1 All ER 720n]... (emphasis added).

Mr. Thangaraj sought to defend the course taken by the plaintiff in framing the originating summons as he did solely by relying on the mode adopted by the defendant in *Hotel Ambassador*. But as adverted to earlier in this judgment and for the reasons given, the mode adopted there by way of summons in chambers was the appropriate one for the determination of the issues in that case in accordance with O. 33, as that was an action begun by writ. In the present case, the proper originating process for commencing summary proceedings for possession of land should have been through the use of Form 8A. However, the failure to use Form 8A is to be treated as an irregularity under O. 2 which does not nullify the proceedings.

Turning now to what was termed the substantial ground on which the defendants sought to resist the plaintiff's application, i.e. that the houses on the property were controlled premises and that the plaintiff could only recover possession in accordance with the provisions of the Act, it was not in dispute that the defendants had been monthly tenants of the previous owner and that the houses on the property were controlled premises within the meaning of the Act. It was contended for the defendants that their occupation of the premises could not, therefore, be validly terminated by the notices to quit of 28 July 1992, while it was countered on behalf of the plaintiff that the notices to quit were valid as the plaintiff had had no prior notice of any lease or sublease of the property granted to the defendants by an instrument in Form 15A or 15B of the Code as required by s. 221(4) or 222(4) thereof respectively or of any claim of the defendants to be entitled to the benefit of a tenancy exempt from registration by endorsement on the register documents of title of the land as required by s. 316(1) of the Code. The plaintiff's inspection of the register documents of title had not revealed the existence of any such lease, sublease or tenancy.

As the defendants themselves claimed that theirs were monthly tenancies (and not leases or subleases under ss. 221(4) and 222(4) of the Code), the provisions of the Code governing such tenancies need to be considered. By subsections (1) and (2) of s. 213 of the Code, a monthly tenancy is a tenancy exempt from registration under that section. Subsections (3) and (4) of that section provide:

> (3) Notwithstanding the provisions of subsection (2), no tenancy exempt from registration granted after the commencement of this Act shall be binding on -
>
> (a) any person or body to whom the grantor subsequently transfers the reversion

expectant thereon, or to whom he subsequently grants any lease, sublease, tenancy or charge, or in whose favour any lien over that reversion is subsequently created; or

(b) any person or body claiming through or under such a person or body,

unless, prior to the date on which the dealing referred to in paragraph (a) takes effect, the tenancy has become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

(4) Where any land or lease subject to a charge or lien is transferred pursuant to an order for sale under Chapter 3 of Part Sixteen, the provisions of subsection (3) shall have effect as supplemented by subsection (2) of s. 267 or, as the case may be, by that subsection as applied by subsection (3) of s. 281.

Section 267 of the Code sets out the effects of sale of charged land as follows:

(1) Any certificate of sale given to a purchaser under subsection (3) of s. 259 or subsection (4) of s. 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as an instrument of dealing, and shall be registrable accordingly under Part Eighteen; and, upon the registration thereof -

(a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto; and

(b) subject to paragraph (a), and subsection (2), the relevant provisions of Part Fourteen shall apply as if the chargor had transferred the land or lease to the purchaser in accordance with the provisions of that Part.

(2) Notwithstanding that it was granted with the consent in writing of the chargee, as required by subsection (1) of s. 226, no tenancy exempt from registration granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

(3) The provisions of subsection (2) shall have effect in addition to those of subsection (3) of s. 213, under which, by virtue of the fact that he claims through the chargee, the purchaser will not be bound by any tenancy granted by the chargor before the date of registration of the charge unless it had become protected by endorsement prior to the date.

Section 316(1) of the Code stipulates that any person or body claiming to be entitled to the benefit of a tenancy exempt from registration may, **for the purpose of protecting his rights thereunder against subsequent dealings**, as mentioned in s. 213 of the Code, apply to the registrar of titles (or the land administrator, as the case may be) under s. 316 of the Code for the endorsement of his claim on the register document of title to the land thereby affected (emphasis added).

It becomes clear from the foregoing provisions of the Code that any person who claims to be entitled to the benefit of a monthly tenancy (as the defendants claim here) in respect of charged land which is subsequently sold by a Court-ordered public auction must, prior to the date of registration of the certificate of sale, apply to protect the tenancy by an endorsement on the register document of title to the land in question. Otherwise the purchaser will not be bound by any tenancy granted by the chargor, even with the consent in writing of the chargee as required by s. 226(1) of the Code. In the present case, there was no such endorsement on the register documents of title to the land in question which therefore removed the monthly tenancies of the defendants from the protection they would otherwise have enjoyed under the Code. It was never contended that the tenancies had been granted by the chargor with the consent in writing of the chargee.

In *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221, after reviewing the position of leases and subleases for a term exceeding three years and those for a term not exceeding three years ("tenancies exempt from registration") under the Code and the Federated Malay States Land Code (Cap 138) ("the former Land Code"), Edgar Joseph Jr J (as he then was) states the law succinctly at p. 225 of the report:

> Another difference between the former Land Code and the Code, which is relevant to the present case, is that whereas formerly, a tenancy exempt from registration had the status of an overriding interest which required no protection against subsequent dealings (s. 42 (v) thereof and the case of *Yeap Yok Tee v. Lee Boon Bee* [1973] 1 MLJ 3), the present Code

cancelled out this exception and although it exempts all short tenancies not exceeding three years from registration, **all such tenancies are required to be protected by way of an endorsement in the register document of title, otherwise an unprotected tenancy will not bind the holder of an indefeasible title or interest** (emphasis added). ...

As Dr. David Wong says in his book **Tenure and Land Dealings in the Malay States**, at p. 454 after reproducing s. 213(3):

> Thus unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both, the later being non-registrable.

In the present case, it was common ground that the occupants had not, after expiry of their lease, taken the precaution of protecting their short tenancy of less than three years by endorsement in the register document of title as provided for in s. 316(1). The effect of this omission was to defeat the occupants' tenancy, or in other words, their tenancy was not binding on the purchasers.

As for any tenancy exempt from registration granted by the chargor **after** the date of registration of the charge concerned, and even with the consent of the chargee, it will not bind the purchaser unless it has become protected by an endorsement under s. 316(1) of the Code **prior** to the date of registration of the certificate of sale (see s. 267(2)). And, as for any tenancy exempt from registration granted by the chargor **before** the registration of the charge concerned - as in the present case, since the occupants' lease expired on 21 March 1976, after which they held over as monthly tenants and the charge was registered on 15 May 1982 - it will not bind the purchaser unless it has become protected by endorsement **prior** to the date of registration of the charge (see s. 267(3)).

In respect of the argument put forth in that case that condition 8 of the proclamation of sale there that the disputed property was sold **"subject to all existing tenancies, if any and all claims of tenants and occupiers by contract, custom, statute or otherwise"** (emphasis added) which, it must be noted, was framed in much wider language than the condition in the present case that the property was "....sold subject to all assets, liabilities and rights (if any) subsisting thereon ...", his Lordship had this to say at pp. 225 - 226 of the report:

> ... This condition must be understood to refer only to tenancies binding on the purchasers. Short tenancies of less than three years not protected by endorsement under s. 316 (1) of the Code, are not binding on the purchasers, and are obviously excluded from the contemplation of condition 8. In any event, any attempt to contract out of clear statutory provisions aforesaid would be void and wholly ineffective as being contrary to public policy ...

This judgment was fully approved by the Supreme Court on appeal (see [1991] 1 MLJ 404). In delivering the judgment of that Court, Hashim Yeop A Sani CJ (Malaya) (as he then was) elaborated thus with precision at pp. 408-409 of the report:

> Section 267 of the National Land Code 1965 provides for the effect of sale pursuant to an order of sale made by the Court under s. 256 of the Code. Section 267 states that any certificate of sale given to a purchaser under s. 259 (3) of the Code should be treated for all purposes under the Code to be an instrument of dealing and shall be registrable and upon registration thereof the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge. Section 267 (2) further provides that notwithstanding that it was granted with the consent in writing of the chargee, no, tenancy **exempt from registration** granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title. This statutory provision is crucial in this case because it is not disputed here that there was no endorsement of any tenancy.
>
> Since the appellants' lease expired on 21 June 1976 after which they held over as monthly tenants and the charge which resulted in the sale was registered on 15 May 1982, the tenancy would not bind the respondents until the tenancy has become protected by endorsement prior to the date of registration of the certificate of sale.
>
> **Section 267 (2) of the Code is an explicit statutory provision and its language clearly requires it to be strictly enforced** (emphasis added). ...
>
> Finally, there is the question of interpretation of condition 8, whether it should be

confined only to a tenancy endorsed as exempt tenancy under ss. 316 and 317 of the Code prior to the date of registration of the certificate of sale referred to earlier.

Under s. 213(1)(a) of the Code 'tenancy exempt from registration' means any tenancy or subtenancy for a term not exceeding three years granted pursuant to s. 223 of the Code, i.e. granted by the **proprietor** of any alienated land, by any **lessee** or **sublessee** for the time being and by any person holding under such tenancy or subtenancy.

We agree with the learned Judge that the words 'all existing tenancies' must mean only tenancies protected by the Code. We adopt as the learned Judge did what Dr. David Wong said in his book **Tenure and Land Dealings in the Malay States** at p. 415 when referring to s. 213(3) of the Code that '... unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both, the later being non-registrable'.

In conclusion, what is therefore the status of the appellants *vis-a-vis* the disputed property? According to the learned Judge they are trespassers, or at most, bare licensees based on the facts stated earlier. Assuming they were licensees the service of the summons in chambers itself was a notice of termination of the licence. The case of *Canas Property v. KL Television* [1972] 2 All ER 795 is authority for the proposition (at p. 799) that the service of proceedings claiming possession makes the person on whom the proceedings are served trespassers. In the Court of Appeal (Lord Denning MR, Fenton Atkinson and Megaw LJJ) the question raised was, if a landlord brings an action for forfeiture when does the lease come to an end, when the writ is issued or when it is served? It was held that:

> A lessor does not effect a forfeiture merely by issuing a writ for possession against a lessee or assignee who is in breach of covenant. It is the service, not the issue of the writ, which is equivalent to re-entry and effects a forfeiture; and the lease is determined from the date of service.

In fact prior to the issue of the summons in chambers in this case the appellants had notice when the respondents' former solicitors served them with the notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from the date of receipt thereof which the learned Judge held to be more than sufficient notice to a bare licensee. We agree.

It was submitted on behalf of the defendants that s. 225(1)(a) of the Code provides for the application of the Act to the present case in that there is a prohibition or limitation imposed by ss. 16 and 18 of the Act to the exercise of powers under Chapter I of Part Fifteen of the Code. It was further argued that the Act was a later law relating to a specific matter (ie controlled premises) and it should therefore prevail over the provisions of the Code. With respect I am unable to agree. Section 225 of the Code refers to and only limits exercise of powers conferred by Chapter I of Part Fifteen whereas s. 316 and the other relevant sections of the Code (discussed earlier in this judgment) are found elsewhere than in the said Chapter I and are in no way restricted by s. 225. In addition, the requirement for a tenancy exempt from registration to be endorsed on the register document of title of the affected land for the purpose of protecting the tenant's rights against subsequent dealings cannot be construed as any prohibition or limitation imposed upon the operation of the Act. Once the endorsement is effected under s. 316 of the Code, then the tenancy, although exempt from registration, becomes protected pursuant to Chapter 7 of Part Eighteen of the Code and binding on the purchaser. This additional requirement of endorsement for the protection of a tenancy exempt from registration cannot, with respect, be said to detract from the provisions of the Act in respect of controlled premises or to create a conflict between the Code and the Act. All that the Code does is to require a monthly tenant (including a monthly tenant of controlled premises), who wishes to have his tenancy protected from impingement thereon by a *bona fide* purchaser of the affected land and against whom he would otherwise have no protection under the Code, to have the register document of title to the affected land endorsed. If he does not take this protective measure, then the relationship of landlord and tenant for the purposes of the Act will not enure between him and the *bona fide* purchaser of the land who will not have had any notice or intimation of his claim to be entitled to the benefit of the tenancy. This is because, by virtue of the fact that the purchaser claims through the chargee, the latter should have been made aware of the existence of the tenancy granted by the chargor

before the date of registration of the charge by an endorsement on the register document of title. In my view only then will there exist the relationship of landlord and tenant between the purchaser and the tenant of the chargor for the purposes of the Act. Otherwise there will be no such relationship created for the occupant to be a protected tenant of controlled premises under the Act.

In my view the legislature had no intention to exclude the Act from the operation of the provisions of the Code. In this context, s. 4 of the Code requires reproduction *in toto:*

(1) Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act:

**Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act** (emphasis added).

(2) Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of

(a) any law for the time being in force relating to customary tenure;
(b) any law for the time being in force relating to Malay reservations or Malay holdings;
(c) any law for the time being in force relating to mining;
(d) any law for the time being in force relating to sultanate lands;
(e) any law for the time being in force relating to **wakaf** or **bait-ul-mal**;
(f) the Trengganu Settlement Enactment 1356;
(g) the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955;
(h) the Kelantan Land Settlement Ordinance 1955;
(i) the Land (Group Settlement Areas) Act 1960; or
(j) any law for the time being in force relating to exemptions from the payment of land revenue;

and, in the absence of express provision to the contrary, if any provision of this Act is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall, to the extent of the inconsistency, be void.

The proviso to subsection (1) makes it amply clear that any right or privilege existing at the commencement of the Code (on 1 January 1966) by virtue of the provisions of any other law, so far as they relate to land, passed before the commencement of the Code (which would include the right of protection in respect of a tenancy of controlled premises under the Control of Rent Ordinance 1956) **shall, "except as hereinafter expressly provided", be subject to the provisions of the Code** (emphasis added).

Subsection (2) of s. 4 of the Code spells out the excepted laws whose provisions shall prevail over those of the Code in the event of inconsistency between them. The Control of Rent Ordinance 1956 is not among the excepted laws specified in subsection (2). On the other hand, for example, even though the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955 is enumerated in the said subsection (2) among the excepted laws, yet s. 223 (3) of the Code specifically provides that nothing in s. 223 (empowering proprietors and lessees to grant tenancies not exceeding three years) shall authorise a landlord (as defined in the Ordinance) to let land for the cultivation of padi otherwise than in pursuance of that Ordinance.

Similarly, therefore, had the legislature intended tenancies pertaining to controlled premises not to be subject to the requirement of endorsement on the register document of title under the Code in order to enjoy protection under the Act as well, it would have specified the Control of Rent Ordinance 1956 among the excepted laws in the said subsection (2) or provided for it elsewhere in the Code. Although the Ordinance was repealed with effect from 1 January 1967 and substituted by the Act, the provisions of the Ordinance giving protection to tenants of controlled premises were in existence when the Code came into force and were re-enacted in the Act. Hence that right or privilege of protection conferred by the Ordinance and continued under the Act has to be subject to the provisions of the Code, which do not take away that right or privilege but only specify as to how that right or privilege is to be invoked against a *bona fide* third party purchaser of the affected land (and premises thereon).

For the reasons stated above, I found that the defendants were trespassers as no relationship of landlord and tenant had been created between the plaintiff and them. The defendants

were persons who remained in occupation of the premises without the licence or consent of the plaintiff and from 1 September 1992 (the day following the date of which they were required to quit and deliver vacant possession of the premises by the notice dated 28 July 1992), they became trespassers against whom the plaintiff was entitled to apply by way of summary proceedings for vacant possession under O. 89.

I am not alone in the view I take of the contention on behalf of the defendants that they are protected by the provisions of the Act irrespective of the fact that there was no endorsement of their claim on the two register documents of title to the property. In *Public Bank Berhad v. Wan Leong Hup Kee Co.* [1992] 2 CLJ 1070, Haji Abdul Malek bin Haji Ahmad J stated at p. 1071 of the report:

> The contention raised by learned Counsel for the defendant was that the property was rent controlled and that its sole proprietor had rented the ground floor of the property for RM400 per month with effect from 1 September 1987 and the first floor for RM100 per month with effect from 1 January 1991 from Ban Loong Company of which two of the three associates were the former owners who had charged the property to the plaintiff. On receipt of the letter dated 2 February 1991 from the plaintiff to the occupiers of the property as regards the purchase at the auction, the defendant had remitted the RM500 monthly rentals to the plaintiff. The defendant does not deny that there was no tenancy agreement and had only exhibited the relevant rental receipts to support their contention.

It will be observed that in the present case there was no evidence of even an attempt by the defendants to tender the monthly rentals in respect of the property to the chargee and, subsequently, to the plaintiff when he became the registered proprietor thereof.

After referring to ss. 213 (3), 226, 267(2) and 267(3) of the Code in *Wan Leong Hup Kee Co*, his Lordship summarised the position crisply at p. 1072 of the report:

> These provisions had also been given judicial sanction by the Supreme Court in *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 404 and by the High Court in *Than Kok Leong v. Low Kim Hai* [1983] 1 MLJ 187. It follows that even if the Court accepts that there was in fact a tenancy, it is invalid in the circumstances because of the charge unless of course the chargee had given their consent to this and, notwithstanding that consent, it shall not be binding on the purchaser unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by the relevant endorsement on the register document of title.

To this I would add, as Mohamad Dzaiddin JC (as he then was) aptly commented in *Than Kok Leong*, that even if there had been an endorsement of the claim on the two register documents of title of the property in the present case, s. 317(5) of the Code provides that such endorsement "shall not be taken as confirming its validity in any respect". But the absence of any such endorsement in the present case put paid to the argument on behalf of the defendants that the condition of sale that the property was sold "... subject to all assets, liabilities and rights (if any) subsisting thereon ..." bound the plaintiff in the same way as it bound his predecessor in title, the chargor. As his Lordship said in *Than Kok Leong* at p. 189 of the report:

> One other material point raised in the defence is that of knowledge or notice of such a tenancy being granted to the defendant. It was submitted that the plaintiff was estopped from evicting the defendant. Counsel for the defendant further submitted that -
>
> (a) a purchaser is bound by all equities enforced against his previous landlord,
> (b) actual notice of occupation or possession amounts to constructive notice of the extent and interest of the person in possession.
>
> In answer to that, my view is that the law governing this particular case is the National Land Code 1965 and s. 213(3) does seem to me to impliedly exclude this question of knowledge or notice actual or constructive, because it says that 'unless, prior to the date on which the dealing referred to (takes effect), the tenancy had become protected by an endorsement on the register document of title'. See also *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 at p. 214, on equitable doctrine of notice.
>
> I also agree with the submission of the plaintiff's Counsel relating to equitable notice as found in the English law. This principle has no application in land dealings in Malaysia. By s. 6 of the Civil Law Ordinance 1956 ...
>
> > the law of England relating to the tenure or conveyance or assurance of succession to any immovable property or any estate, right or interest therein ...

is expressly excluded from the general reception of English common law and rules of equity as part of the law of Malaysia. See *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 at p. 270.

*Than Kok Leong* went on appeal to the then Federal Court which heard the appeal on 23 September 1982 and dismissed it with costs.

Therefore, the particular condition of sale in the present case that the property was "... sold subject to all assets, liabilities and rights (if any) subsisting thereon ..." must mean, to paraphrase the Supreme Court in the *Hotel Ambassador* context, *inter alia* only rights to tenancies protected by the Code.

In the circumstances, I proceeded to make an order in terms of the originating summons herein that the defendants deliver vacant possession of the property in question, not forthwith as claimed, but at the expiry of three months from the date of the order and awarded costs against the defendants. I also ordered that damages be assessed by the Registrar on a date to be fixed.

Learned Counsel for the defendants then applied orally for adjournment of the matter into Court for further argument under O. 56, r. 2(2) (repealed with effect from 1 August 1993). I declined to hear them further as the matter had been fully canvassed before me in chambers.

This was followed by an application for a stay of my order in terms of the originating summons pending an appeal to the Supreme Court. This was refused as there were no special circumstances which justified a stay and further, in my view, the issue had been determined by the Supreme Court in *Hotel Ambassador* after full consideration of the relevant provisions of the Code. That decision is binding on me.

**PUSHPADEVI SINGAM**

**v.**

**UNIVERSITY OF MALAYA**

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. P 449 OF 1984]
25 AUGUST 1993

***EMPLOYMENT LAW: Terms and conditions of employment - Entitlement to sick leave - Applicable statutes and regulations - Whether plaintiff had exceeded her entitlement - Plaintiff boarded out on medical grounds - Whether plaintiff's dismissal valid and proper.***

***ADMINISTRATIVE LAW: Defendant convening Medical Board to investigate into general health of plaintiff - Medical Board recommending that plaintiff be medically boarded out - Role of Court in exercising power of judicial review over proceedings carried out by Medical Board - Whether Medical Board had committed error of law in reaching its decision - Whether Medical Board had taken into consideration irrelevant matters in reaching its decision - Whether Medical Board's recommendations defective in law - Whether plaintiff's termination of service void ab initio.***

The plaintiff was employed as a telephone operator by the defendant University. Shortly after the plaintiff's appointment the defendant enacted the University of Malaya Medical Service Scheme Regulations (the UMMSS Regulations) under which the plaintiff was entitled to sick leave of 90 days in any calendar year with the grant of any further sick leave being at the discretion of the University Council.

Upon the formulation of the Skim Gaji Harun, the defendant passed Service Circular UM01 of 1975 which provided that an employees' eligibility for medical leave would be for a period of 90 days in the first instance subject to a maximum of 180 days in a year or at any one time. The plaintiff opted to accept the Harun Scheme as set out in UM01 of 1975.

In 1978 the plaintiff had taken 93 days medical leave and the defendant convened a Medical Board under Rule 10 of the UMMSS Regulations to consider whether the plaintiff, by reason of her health, was fit to carry on her duties. The Medical Board at its first meeting came to the conclusion that the plaintiff was physically fit to work but suggested that she should be referred to a psychiatrist for an examination